No. 16-15172

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORNELE A. OVERSTREET, Regional Director of the Twenty-Eighth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Petitioner–Appellee,

v.

SHAMROCK FOODS COMPANY,

Respondent–Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. 2:15-cv-01785-DJH
The Honorable Diane J. Humetewa

Appellant's Opening Brief

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Rule 26.1 Disclosure Statement

Respondent is a privately owned corporation and has no parent corporation. No publicly held corporation owns 10 percent or more of Respondent.

Table of Contents

Table of Authorities

Cases

NLRB Decisions

Statutes

Rules

Other Authorities

Introduction and Summary of Argument

Injunction actions pursuant to Section 10(j) of the National Labor Relations Act at the organizing stage "usually involve an employer's response to an organizational campaign with serious, if not massive, unfair labor practices," such that remedial action by the National Labor Relations Board would be insufficient to vindicate workers' rights.[1] But this is not the usual case. In response to a union organizing campaign at its Phoenix, Arizona warehouse, Shamrock Foods Company played it by the book, consistently informing employees that they have the right to support a union, encouraging them to do their own research on the realities of union representation and collective bargaining, and explaining to employees why the company itself believed that over the long haul union representation would be bad for the company and its employees.[2]

For expressing that view—as is Shamrock's right under the Act and the First Amendment—the Regional Director brought this action to (in his words) "send[] a message." So he cobbled together a case from dozens of instances of

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[1] Section 10(j) Manual—User's Guide, Office of the General Counsel, NLRB (Sept. 2002), *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/redacted_10j_manual_5.0_reduced.pdf.

[2] The following statement by Shamrock's Vice President of Operations to employees is representative: "[T]rust but verify. Use the Internet. Go out there. Jump on the Internet. Do your own research. There's tons of stuff out there that's pro-union and there's [tons] of stuff out there that's against unions. Okay? And so the material is out there. You can look at it yourself, you make your own judgments." ER234. *See also* ER235; ER258, ER260; ER269–70.

innocuous conduct, attempting to overwhelm by sheer quantity. Many of the charges strain credulity: a floor captain's impromptu conversation with a coworker by the time clock is, to the Director, both a coercive "interrogation" and an attempt to create an "impression of surveillance" because the floor captain "said that he had heard rumors" about a union; another chance encounter on the warehouse floor that the Director's own witness says consisted entirely of "small talk" also amounts, in the Director's view, to "interrogation" and "surveillance"; a manager's reference to Shamrock's longstanding open-door policy was, in the Director's view, an unlawful promise of a benefit conditioned upon rejection of union representation; and another charge of creating an impression of surveillance is based entirely on a manager's use of the colloquialism "rumblings coming off the floor" to describe harassment and other disruptions in the warehouse.

These strained characterizations are causing serious consequences for Shamrock. The district court believed that the National Labor Relations Board's approval of the filing of a Section 10(j) action was enough in itself to "support[] a likelihood of success on the merits," never mind the specific facts or the law. ER7. It not only credited every single one of the Regional Director's charges, but it did him one better by relying on speech conduct that even the Director did not challenge as support for its view that the Director was likely to succeed on the merits of *all* of his charges—including charges so weak that the Board's General Counsel abandoned them in concurrent proceedings before an Administrative Law Judge. Citing an "anti-union video," Shamrock

officials' "very negative view[] of unions," and an official's statement that a union is "not good for us here at Shamrock"—things that are absolutely protected under the Act and the First Amendment and that the Director accordingly never challenged—the district court waved away all of Shamrock's objections. ER7, ER9–10.

That was a serious error. After *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), it is established beyond dispute that a party seeking extraordinary relief must establish that he is likely to succeed on the merits of his claims. And this Court's cases set "a higher bar than usual" in cases like this one where a requested Section 10(j) injunction runs "at least *some risk*" of enjoining constitutionally protected speech. *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957 (9th Cir. 2010). Here, the Regional Director brought a Section 10(j) injunction action to "send[] a message" to an employer that asserted its First Amendment right to share its viewpoint on unionization with its employees. The risk to Shamrock's First Amendment rights is a certainty: the injunction broadly regulates Shamrock's speech to its employees, barring it from expressing its opinions regarding the realities of union representation, from investigating or even discussing workplace harassment associated with the organizing campaign, and from "soliciting employee complaints," among many other things. The district court nonetheless refused to apply the heightened standard, mistakenly believing that it was applicable only to media. That error constitutes abuse of discretion.

As does the lower court's cursory, one-sided assessment of irreparable harm and the other equitable factors required to support extraordinary relief. The whole point of a Section 10(j) injunction is to preserve the Board's remedial authority to the extent that the passage of time would otherwise erode it, but the district court made no attempt to ascertain the extent to which any irreparable harm here could not be later remedied by the Board. Instead, it again deferred, presuming that the Regional Director's likelihood of success on the merits warranted equitable relief and giving no consideration to evidence (from the labor union's own filings) that the organizing campaign was not impeded by any of the alleged unfair labor practices. It deferred again with respect to the balance of hardships, completely ignoring the plain injury to Shamrock's speech rights and business interests, and yet again with respect to the public interest, ignoring Congress's public policy determination in favor of uninhibited debate over issues regarding unions and collective bargaining.

The district court's assessment of the merits is unsupportable under any standard. Interpreting the Act to reach Shamrock's speech raises serious First Amendment issues. Beyond that, the facts do not support the district court's determinations that Shamrock engaged in threats and interrogation of employees regarding their union activities or that its years-long practice of conducting employee roundtables to solicit criticism and complaints somehow coerced employees or interfered with their exercise of rights under the Act. Likewise, the petition's numerous charges regarding alleged "surveillance" and statements allegedly creating the "impression of surveillance" fall flat under scruti-

ny. And the district court's implicit finding that a wage increase granted by Shamrock violated the Act—it enjoined further increases without even discussing the charge—fails to consider Shamrock's unrebutted evidence that it raised wages for a small group of employees in several positions for legitimate business purposes, after it had experienced difficulty recruiting for those positions. Finally, the evidence does not support any claim that Shamrock retaliated against two of its employees, Thomas Wallace and Mario Lerma—Shamrock had no way of knowing at the time it terminated Wallace (for storming out of a meeting with senior management) that he supported the labor union, and Lerma was never disciplined at all, under Shamrock's written disciplinary policy.

In sum, the challenge on the merits in this case is sorting the wheat from the chaff, because the Regional Director's charges amount to a heap of chaff and little or no wheat. The district court, however, made no attempt to undertake that task, granting extraordinarily broad relief—enjoining Shamrock's speech, enjoining it from raising wages and soliciting complaints, enjoining conduct in a separate dairy facility that's not the subject of any charge—on the view that Shamrock's expressed opposition to collective bargaining proves everything or at least suggests that the Regional Director's charges have merit. That is precisely the kind of logic that the Act, and the First Amendment, reject. *See* 29 U.S.C. § 158(c).

The decision below should be reversed, and the injunction vacated.

Jurisdictional Statement

This is an appeal from an order granting a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j). The district court had jurisdiction under Section 10(j), *id.*, and this Court has jurisdiction over appeals of orders granting injunctions pursuant to 28 U.S.C. § 1292(a)(1). This appeal is timely because it was filed on February 4, 2016, within 60 days of the entry on February 1 of the order on appeal. *See* Fed. R. App. P. 4(a)(1)(B).

Statement of Issues Presented for Review

1. Whether the district court abused its discretion when, in its February 1, 2016 Order granting the Regional Director's request for a preliminary injunction, it refused to apply the heightened standard for likelihood of success on the merits that is required where "there is at least some risk that constitutionally protected speech will be enjoined," *Overstreet v. United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1208 n.13 (9th Cir. 2005), and instead expressly deferred to the Board's decision to authorize a Section 10(j) petition.

2. Whether the district court abused its discretion by presuming irreparable injury and inadequacy of remedial action by the Board with respect to all of the Regional Director's charges and all aspects of the Director's requested injunction, or by failing to give serious consideration to Shamrock's equities, in violation of *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 22 (2008).

3. Whether the district court erred in finding that the Regional Director is likely to succeed on the merits of all of his of unfair-labor-practice charges, including charges that were abandoned in administrative proceedings or dismissed out of hand by the Administrative Law Judge.

4. Whether the district court abused its discretion when it entered an injunction restricting Shamrock's speech to its employees, oversight of its employees, interactions with its employees, and workplace management.

Statement of the Case

Shamrock Foods is a family-owned food manufacturer and distributor, supplying fresh and frozen foods, specialty items, and dairy products to food-service customers and markets across the western United States. This case concerns events at its Phoenix, Arizona, distribution warehouse. According to affidavit testimony submitted by the Regional Director, the Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, AFL-CIO/CLC (the "Union") launched a campaign in late 2014 to organize an undefined group of employees in the Phoenix warehouse. ER101.

On April 15, 2015, the Union filed an unfair labor practice charge against Shamrock with the Board. On July 21, the Regional Director served Shamrock with a complaint alleging a number of purported violations between January 25 and July 8. ER67. A trial was conducted before an Administrative Law Judge ("ALJ") between September 8 and September 16.[3]

[3] All dates, unless otherwise noted, are in 2015.

The same day that the ALJ proceeding commenced, the Regional Director filed a petition for injunctive relief pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j). The petition alleges that Shamrock engaged in various unfair labor practices within the meaning of Section 8(a)(1) and Section 8(a)(3) of the Act, which respectively prohibit an employer from acting to "interfere with, restrain, or coerce employees in the exercise" of rights to organize and collectively bargain and, "by discrimination in regard to hire or tenure of employment or any term or condition of employment[,] to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(1), (3).

In particular, the petition alleges that Shamrock officials and managers interfered with the Union's organizing campaign by making unlawful remarks, "interrogating" employees concerning their union sympathies, creating the "impression of surveillance" through discussion of harassment related to the campaign, "confiscating" union literature, granting a wage increase to dissuade employees from supporting the union campaign, and soliciting employee complaints. ER36 *et seq.* The petition also alleged that Shamrock retaliated against two employees, Thomas Wallace and Mario Lerma, for their support of the Union. ER39, ER44, ER48. Injunctive relief was necessary, the petition concluded, to prevent Shamrock's employees from "permanently and irreversibly los[ing] the benefits of the Board's processes and the exercise of statutory rights for the entire period required for the Board adjudication." ER49–50.

As described in detail below, the petition egregiously mischaracterized mundane workplace events and conversations. For example, many of the pur-

ported "threats" concerned Shamrock officials sharing opinions regarding collective bargaining, as is expressly protected by the Act. *See* 29 U.S.C. § 158(c). Many of the purported instances of "interrogation" and "surveillance" were, according to the Director's own evidence, nothing more than idle conversations among coworkers. Shamrock's allegedly "coercive" solicitation of complaints occurred at roundtable meetings with managers that Shamrock has conducted for years and through its longstanding open-door policy. Many of the purported instances of creating an impression of "surveillance" included statements disclosing that information regarding union activity came not from any "surveillance" but from other workers' voluntary statements. The purported "confiscation" of union literature was nothing more than the routine discarding of flyers left unattended in a break room. The wage increase for 33 employees was based on well-documented and uncontested economic realities, including pay disparities identified by Shamrock and increased duties for some employees. Finally, Shamrock could not have retaliated against Wallace because it had no knowledge of his union activities, and Lerma had not been disciplined at all, just counseled regarding allegations of harassing other employees before the situation could escalate.

Shamrock also pointed to evidence, derived from the Union's own filings, that its organizing campaign had, if anything, accelerated in the weeks prior to the filing of the petition, undermining any claim as to the necessity of injunctive relief or insufficiency of Board remedies. According to Union organizer Steve Phipps's August 31 affidavit, the Union had collected only 107 cards

as of that date. ER101. But, on September 16, the Union filed a new charge with the Board asserting majority support and demanding that Shamrock enter collective bargaining without a secret ballot election. ER285. While the Union subsequently withdrew this charge, it has never abandoned or contradicted its claim, made under penalty of perjury, that it collected cards from a majority of its contemplated unit.

The district court granted the petition on February 1, 2016, entering the requested injunction. ER2 (opinion); ER16 (injunction order). The court's opinion ignored nearly all of Shamrock's evidence and arguments, and declined to even discuss most of the charges, on the view that "[t]he 'special deference' owed to Petitioner's receipt of unanimous approval by the Board supports a finding of likelihood of success on the merits." ER7. That deference, the opinion stated, was supported by Shamrock officials' correct statements that collective bargaining begins with a blank slate, by their expressed "negative views of unions," and by the screening of an "anti-union video"—the last two of which the petition did not even allege constituted unfair labor practices. ER7. The court did find that the Regional Director was likely to succeed on his claims regarding Wallace and Lerna, but stated that it "will not here specifically address the evidence supporting every one of Petitioner's claims of unfair labor practices," instead just announcing that the Regional Director was likely to prevail on all of them. ER11.

The court's deference to the Regional Director on the merits caused it to defer, as well, in finding irreparable harm, relying solely on Wallace's dis-

charge, ER12 ("[T]hat violation alone establishes likely irreparable harm."), and Phipps's statement that union activity had dropped off, *id*. It ignored Shamrock's evidence that the Union's campaign was (based on the Union's filings) apparently unaffected by any alleged unfair labor practices, made no assessment of the need for injunctive relief to preserve the Board's remedial authority, and did not attempt to assess irreparable injury with respect to other charges or other aspects of the injunction.

Finally, the court's deference to the Regional Director on the merits again led it to defer in assessing the balance of harms and public interest. Because it found against Shamrock on all counts, it reasoned, "injunctive relief would simply require Respondent to cease any unlawful conduct." ER13. And it found "that by demonstrating a likelihood of success on the merits and likely irreparable harm, Petitioner has demonstrated that § 10(j) relief here is in the public interest." *Id*.

Having deferred to the Regional Director across the board, the district court entered the exceptionally broad injunction the Director had requested, much of which concerns (either expressly or by implication in light of the underlying charges and court opinion) Shamrock's protected speech. ER16. It prohibits Shamrock from, *inter alia*: "interrogating employees"; "conveying to employees that their union activities are under surveillance"; "threatening employees with loss of benefits"; "informing employees that it is futile for them to select the Union or any other labor organization as their bargaining representative"; "granting employees benefits…for the purpose of influencing employees'

union activity"; "soliciting employee complaints and grievances"; "selectively and disparately enforcing its no-solicitation and no- distribution rules"; and "disciplining employees by issuing them verbal warnings or otherwise because they engage in union and other protected activity." ER16–17. The order also directed Shamrock to reinstate Wallace and remove any records of Lerma's purported discipline (of which there were none). ER18. Inexplicably, the order extended to Shamrock's Phoenix dairy, which was not the location of any charge. *See* ER18.

Shamrock timely appealed the injunction order. ER21.

The ALJ rendered a decision on February 11, 2016 ("ALJ Decision"), finding for the General Counsel on some charges and for Shamrock on others.[4] Shamrock intends to file exceptions to the ALJ's findings in favor of the General Counsel.

On February 10, 2016, Wallace informed Shamrock that he does not wish to be reinstated. Declaration of Natalie Wright ("Wright Declaration").[5]

Standard of Review

This Court applies "the same standard of review" to an order granting or denying a Section 10(j) injunction as it does to orders concerning preliminary injunctions. *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957 (9th Cir. 2010). A Section 10(j) injunction order is therefore subject to review for abuse

[4] That decision is the subject of a motion to supplement the record on appeal filed concurrently with this brief. *See* Doc. No. 16.

[5] That declaration is also the subject of the motion to supplement.

of discretion. *Id*. "A district court abuses its discretion when it applies the wrong legal standard or when its findings of fact or its application of law to fact are 'illogical, implausible, or without support in inferences that may be drawn from the record.'" *Glick v. Edwards*, 803 F.3d 505, 508 (9th Cir. 2015) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). The Court "review[s] the legal standards applied by the district court *de novo*." *Overstreet v. United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1204 (9th Cir. 2005).

Argument

I. The District Court Abused Its Discretion by Improperly Deferring to the Agency on All Elements of the Preliminary Injunction Standard

To obtain a Section 10(j) injunction, the Regional Director generally "'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957 (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). "[A] higher bar than usual is set," however, in cases like this one "where 'there is at least *some risk* that constitutionally protected speech will be enjoined.'" *Id*. (emphasis in original) (quoting *Overstreet v. United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1208 n.13 (9th Cir. 2005)). The court below applied the wrong legal standard, thereby committing abuse of discretion, in three respects: (1) refusing to apply *Overstreet*'s "higher bar" despite the plain risk of injury to Shamrock's constitutionally protected speech; (2) presuming that alleged violations of the NLRA are

sufficient to constitute irreparable harm and warrant injunction; and (3) giving no meaningful consideration to Shamrock's equities.

A. The District Court Abused Its Discretion by Refusing To Apply *Overstreet*'s "Particularly Strong Showing" Standard for Injunctions That Risk Violating the First Amendment

The court below refused to apply *Overstreet*'s heightened standard for injunctive relief on the mistaken belief that it is limited to circumstances like those where an injunction might compromise a "publication's First Amendment right to exercise editorial control." ER5. That view is badly mistaken.

In *Overstreet*, the Court held that a heightened standard, without any deference to the Board or its regional directors, applies to requests for injunctive relief pursuant to the Act where "there is at least some risk that constitutionally protected speech will be enjoined." 409 F.3d at 1207, 1208 n.13. In that case, a regional director sought to enjoin members of a labor union from displaying banners that announced a labor dispute, alleging that the action constituted an unfair labor practice. *Id*. at 1201–03. The Court explained that, where an injunction respondent advances a "colorable" First Amendment defense to a labor-practice charge, "only a particularly strong showing of likely success, and of harm to the defendant as well, could suffice" to justify injunctive relief. *Id*. at 1208 & n.13. The proper inquiry, it explained, is not "whether the First Amendment *does* protect the [speech at issue], or even whether it probably does," but only "whether [granting the request for an injunction] presents a significant risk that the First Amendment will be infringed." *Id*. at 1209 (quotation marks omitted). Undertaking that inquiry, it recognized that "billboards

and signs are generally accorded full First Amendment protection," such that the requested injunction posed a "plausible" risk to First Amendment rights. *Id*. at 1211. Accordingly, it applied the heightened standard, assessing likelihood of success on the merits "without deference to the Regional Director's position." *Id*. at 1212.

The Court applied the same heightened standard in *McDermott*, a Section 10(j) injunction action seeking the reinstatement of employees whom the Regional Director alleged had been discharged for union activity in violation of the Act. 593 F.3d at 953. It reasoned that "granting the requested injunction would present at least some risk of compromising the [newspaper's] First Amendment right to exercise editorial control." *Id*. at 958.

As the injunction at issue here broadly regulates Shamrock's speech to its employees, the risk to Shamrock's First Amendment speech rights is more than "plausible." The Regional Director's petition sought relief based principally on Shamrock's speech to its employees, including statements and opinions regarding the realities of collective bargaining, a memorandum by management concerning "unlawful bullying" and threats, routine discussions with employees, and solicitation of feedback on workplace issues. ER41–49. The district court, even while skipping past most of the charges and evidence at issue, specifically singled out Shamrock officials' airing of "negative views of unions" and screening of an "anti-union video" as demonstrating the Regional Director's likelihood of success on the merits. ER7. The injunction, in turn, bars Shamrock from engaging in such speech going forward—for example, it is prohibit-

ed from further expressing its opinions regarding the realities of union representation and from "soliciting employee complaints and grievances," among many other things. ER16–17.

Under *Overstreet*, it is enough to observe that the speech at issue here—for example, expressing negative views of unions—is "generally accorded full First Amendment protection." 409 F.3d at 1211. Indeed, as *Overstreet* itself explains, speech "designed to convince others not to engage in behavior regarded as detrimental to one's own interest, or to the public interest, is fully protected speech." *Id*. (quotation marks omitted) (citing authorities). More specifically, the Supreme Court has affirmed an employer's right to freely "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). *See also NLRB v. Gen. Tel. Directory Co.*, 602 F.2d 912, 916 (9th Cir. 1979) (holding statements like that here regarding collective bargaining to be "protected speech"). Accordingly, the injunction here poses at least a "plausible" risk to Shamrock's First Amendment rights, which triggers *Overstreet*'s heightened standard. 409 F.3d at 1211. Whether the Regional Director's interpretation and application of the Act actually implicates those rights is therefore to be determined "without deference to the Regional Director's position," *id*. at 1212—either by the court below on remand or by this Court.

The court below erroneously took the unusual circumstances of *McDermott*—an action to force a newspaper to reinstate fired reporters—to cover the waterfront of cases subject to *Overstreet*'s heightened standard. Its complete reasoning: "In *McDermott*, the Court found that granting the requested injunction against the respondent newspaper publisher would present at least some risk of compromising the publication's First Amendment right to exercise editorial control. No such risk is present here." ER5.

But neither *Overstreet* nor the precedents on which its holdings rest are so limited. *Overstreet* makes clear that its heightened standard is nothing more than a specific application of the ordinary doctrine of constitutional avoidance, meant to enforce the "need to avoid creating a 'significant risk' to the First Amendment" and thereby calling into doubt a statute's constitutionality. 409 F.3d at 1209 (discussing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The Act, the Supreme Court explained in *DeBartolo*, contains many "nonspecific, indeed vague" terms like "coerce" and "restrain" that must be interpreted and applied "with caution and not given a broad sweep" so as to avoid serious First Amendment questions. 485 U.S. at 578 (quotation marks omitted). *See also BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 535–36 (2002) (applying same avoidance approach to Section 8(a)(1), the main provision at issue in this case). *Overstreet* simply combines that mandate with the general principle that "constitutional decisions are not the province of the NLRB (or the NLRB's Regional Director or General Counsel)," but of the courts. 409 F.3d at 1209.

McDermott, far from limiting the application of *Overstreet*, confirms that its approach applies in Section 10(j) actions and with respect to Section 8(a)'s prohibitions on "unfair labor practices" by employers. *See* 593 F.3d at 955 & n.2. Its survey of First Amendment precedents regarding media to assess the risk of a constitutional violation, *id*. at 959–62, is nothing more than a straightforward application of *Overstreet*'s direction that a court determine whether such a risk is "plausible," *id.* at 958. *Compare Overstreet*, 409 F.3d at 1211–12 (surveying precedents regarding in-person speech, as was at issue in that case).

The district court's refusal to apply *Overstreet*'s heightened standard and decision instead to accord the Regional Director's views "special deference," ER6–7, give short shrift to the principle that the courts should not "lightly impute to Congress an intent to invade…freedoms protected by the Bill of Rights," *BE & K*, 536 U.S. at 525 (alteration in original) (quotation marks omitted), as well as the "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966). The Court should vacate the injunction and "remand for the district court to apply heightened judicial scrutiny in the first instance." *Retail Dig. Network, LLC v. Appelsmith*, 810 F.3d 638, 651 (9th Cir. 2016).

B. The District Court Abused Its Discretion by Improperly Presuming Irreparable Injury Beyond That Which Could Be Addressed by the Board's Remedial Authority

The district court abused its discretion by failing entirely to consider the extent to which, absent an injunction, the unfair labor practices alleged by the

Regional Director would irreparable injure employees' exercise of their rights in ways that could not be remedied by the Board. Instead, the district court simply presumed irreparable harm and the necessity of injunction with respect to every charge and every aspect of the requested injunction, directly contravening this Court's directives (1) to "not presume irreparable harm" in Section 10(j) injunction actions and (2) to require a showing that failure to accord relief would "'render meaningless the Board's remedial authority.'" *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 494 (9th Cir. 2010) (quoting *Miller ex rel. NLRB v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc))). The district court also failed to justify the broad scope of the injunction as necessary to remedy irreparable injury in that fashion, as *Winter* requires. Rather than sorting through the record and attempting to make a determination in the first instance, the Court should vacate the injunction and remand for consideration under the proper legal standard. *See Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

A temporary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. As extraordinary relief, a temporary injunction may not issue based on the "possibility of irreparable harm." *McDermott*, 593 F.3d at 957 (quotation marks omitted). Rather, such relief is a permissible exercise of the district court's discretion only where "the failure to issue an injunction 'likely' would cause irreparable harm" by "render[ing] meaningless the Board's remedial authority." *Small*, 611 F.3d at 494. The Court has applied this standard

consistently in Section 10(j) appeals decided since *Winter*, considering in each case whether an injunction was necessary to affect the facts on the ground during the pendency of Board proceedings. *See McDermott*, 593 F.3d at 965 (affirming injunction denial based on delays by the regional director that would prevent injunction from "actually mak[ing] much difference"); *Small*, 611 F.3d at 494 (affirming injunction based on record evidence that a union's unfair labor practice in bringing pretextual lawsuits would force an employer to assign it work during the pendency of Board proceedings, with no possible relief for that injury); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1364 (9th Cir. 2011) (*Frankl I*) (affirming injunction where "the record provided specific support for the conclusions that there would likely be irreparable harm beyond that which could be remedied once the Board had ruled, and that interim relief was more likely to curb the ongoing unfair labor practices than subsequent relief").

Winter also requires a court, in assessing the need for an injunction to remedy irreparable injury, to justify its breadth. In that case, the Navy challenged two of six restrictions on its training exercises put in place by a district court. 555 U.S. at 22–23. The Supreme Court found that the district court erred in considering only the irreparable harm that might occur if all six restrictions were lifted, instead of the harm that would occur if only two were lifted. *Id*. This Court, in turn, has interpreted that holding as prohibiting district courts from taking "an all-or-nothing approach" when considering whether to grant an injunction. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022 (9th Cir. 2009). Instead, district courts must "address[] the options actually on the

table"—including the option of granting a partial injunction—and offer a rationale for choosing one over another. *Id.* In other words, the court must "consider whether a narrower injunction…will suffice…." *League To Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, No. 08-2828, 2009 WL 3048739, at *6 (E.D. Cal. Sept. 18, 2009). *See also League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (applying *Sierra Forest* approach to consider narrower alternatives); *Rubin ex rel. NLRB v. Vista del Sol Health Servs., Inc.*, 80 F. Supp. 3d 1058, 1075 n.82 (C.D. Cal. 2015) (explaining that *Sierra Forest* requires a court "to consider whether a narrower injunction…would have served to prevent otherwise likely irreparable injury").

Judged by these standards, the decision below fails because it does not meaningfully consider whether the injunction would "make much of a difference," *McDermott*, 593 F.3d at 965, by providing relief that was more effective than that which the Board could order for nearly all of the alleged unfair labor practices in this case. The district court considered only whether an injunction requiring Wallace's reinstatement could impact "employees' exercise of their statutory right to organize" during the pendency of Board proceedings. ER12. But it never considered the necessity during Board proceedings of all the other elements of the extremely broad injunction, including terms concerning Shamrock's speech and workplace management that have nothing to do with Wallace's reinstatement. *See* ER16–17.

Rather than assess that critical question, the district court misconstrued *Frankl I*'s language that "irreparable injury is established if a likely unfair labor

practice is shown along with a present or impending deleterious effect of the likely unfair labor practice that would likely not be cured by later relief," 650 F.3d at 1362, as allowing it to sidestep that inquiry entirely. ER12. But that statement says no such thing, instead expressly requiring a regional director to demonstrate that each "likely unfair labor practice" is supported by a showing of irreparable injury incurable by Board action. Moreover, *Frankl I*'s observations regarding the appropriateness of injunction in typical cases are expressly tied to Section 8(a)(5) (refusal to bargain) and Section 8(a)(3) (discrimination in terms of employment) charges, 650 F.3d at 1362–63, both of which involve injuries that are very different from those associated with run-of-the-mill unfair-labor-practice claims under Section 8(a)(1). In short, *Frankl I* provides no basis for a district court to skip past the requirement that each aspect of an injunction be supported by a showing of irreparable harm incurable by Board action.

The district court's approach of construing Section 10(j) to authorize injunctions for asserted unfair labor practices unsupported by a showing of necessity undermines the Board's primary jurisdiction over unfair labor practices. The "purpose of Section 10(j) is 'to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge.'" *McDermott*, 593 F.3d at 957 (quoting *Miller*, 19 F.3d at 459–60). The "irreparability" of harm to an employee or union means only that equitable relief may be warranted, but does not resolve whether that relief should come in the form of a Board order or a Section 10(j) preliminary injunction.

The district court's failure to address that issue, or to address injury at all with respect to all aspects of the injunction but one, warrants reversal to prevent Section 10(j) from becoming the rule, rather than the exception.

C. The District Court Abused Its Discretion by Failing To Give Meaningful Consideration to Shamrock's Equities

In considering the balance of equities, a district court has a duty to "balance the interests of all parties and weigh the damage to each." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). The district court's complete failure to consider the damage to Shamrock of an injunction therefore constitutes abuse of its discretion.

Overstreet v. Gunderson Rail Services, LLC vacated a Section 10(j) injunction on that ground. 587 F. App'x 379 (9th Cir. 2014). The district court in that case ordered the respondent, GRS, to reopen a shuttered facility, reinstate the employees who had worked there, and bargain in good faith with a union. *Id.* at 380. This Court reversed, finding that the district court "did not meaningfully evaluate these claims or explain its reasons for concluding that the order would not impose significant financial losses on GRS." *Id.* at 381. In so doing, "the court failed to discharge its burden of fairly weighing the equities of both parties," which was "an error of law." *Id.*

The court below committed the same error. The injunction severely abridges Shamrock's free speech rights, regulating and restricting the content of its speech with its employees, particularly as concerns its views on union representation and collective bargaining. *See infra* § II.A. In assessing the balance of

the equities, the district court gave that and Shamrock's other interests—for example, its ability to monitor its employees, to set appropriate wages and benefits, to maintain a polite and harassment-free workplace, etc.—no weight whatsoever. Instead of considering those things, it simply assumed that "granting Petitioner relief would pose little, if any, harm to Respondent." ER13. That refusal to conduct an actual balancing of equities was an error of law, warranting reversal and remand.

II. The District Court Erred Under Any Standard in Finding That the Board Is Likely To Succeed on the Merits

A. Shamrock's Speech to Its Employees Cannot Constitute Coercion Under the Act Consistent with the First Amendment

The Regional Director "stressed that [the district court] should issue a preliminary injunction for purposes of 'sending a message,'" ER6, and the district court based its finding of likelihood of success on Shamrock officials' expression of "very negative views of unions," screening of an "anti-union video," and other speech, ER7. At the heart of this action is Shamrock's speech, and the speech-restricting injunction entered by the court below cannot be sustained under the Act or the First Amendment.

Section 8(c) provides that the "expressing of any views, argument, or opinion…shall not constitute or be evidence of an unfair labor practice…, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). "Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about

a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Where an injunction under the Act "would pose a 'significant risk' of sanctioning a violation of the First Amendment," a court must consider its application *de novo* and, to avoid constitutional doubt, can sanction relief "only if the statute *clearly* prohibits the [challenged] conduct." *Overstreet v. United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1209–10 (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)).

The district court failed to heed these principles. Not only did it improperly defer to the Regional Director's interpretation and application of the law and apply an inappropriately lenient legal standard, *see supra* § I.A, but its cursory analysis of the merits turned on Shamrock's speech opposing collective bargaining—speech that not even the Regional Director contended constituted an unfair labor practice. *See* ER7. It is difficult to conceive a clearer instance of error than a district court's reliance on conduct that is not even alleged to be unlawful to justify a finding of likelihood of success on the merits. There is no dispute among the parties that this speech is fully protected—nor could there be. *See, e.g.*, *Chamber of Commerce v. Brown*, 554 U.S. 60, 68–69 (2008).

The Act, construed in light of First Amendment imperatives, also does not clearly prohibit the speech challenged as "threats" by the Regional Director. The Director claims that Mark Engdahl "threatened" employees with a loss of benefits when he told employees that "the slate is wiped clean…once bargaining begins," and made other statements suggesting that the employees

may end up with less in terms of wages and benefits as a result of collective bargaining. But those statements parallel the language of the Act itself, which explicitly recognizes that the "obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). Indeed, this Court has held that nearly identical statements by an employer—"wage increases would become a negotiable term," the company would start with a "blank piece of paper," and unionization would initiate "horse-trading"—are "well within the employer's 'protected speech' under § 8(c) of the Act." *NLRB v. Gen. Tel. Directory Co.*, 602 F.2d 912, 916 (9th Cir. 1979). Accordingly, it cannot be said that the Act "clearly prohibits" Shamrock's nearly identical speech.

Nor does it clearly prohibit the speech at issue in the other three instances of alleged "threats." First, the Regional Director has abandoned his contention that Floor Captain Art Manning's alleged April 27 comments to Phipps[6] constitute unlawful threats, and so there is no likelihood of success on that charge. ALJ Decision 21–22 n.39. Second, the statement in Shamrock President and CEO Kent McClelland's May 8 employee letter that it would "take appropriate action against anyone threatening [employees] and refer the matter to law enforcement for prosecution to the fullest extent of the law if that is the right course of action" was entirely within Shamrock's rights, as the Act does

[6] Phipps testified that, after he had publicly announced his leadership of the organizing campaign, his coworker told him to "just watch yourself, because they watching both of us (sic), so watch your back." ER143.

not clearly prohibit workplace rules barring "abusive or threatening language"—indeed, the D.C. Circuit has rejected the contention that it does as "preposterous." *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 25–26 (D.C. Cir. 2001).[7] Third, and for the same reason, Engdahl's statements to Lerma at a May 5 counseling meeting regarding reports that he was intimidating other employees were entirely permissible. *See infra* § II.D.

Shamrock's solicitation of employee complaints is also not clearly prohibited by the Act. Going beyond what the First Amendment requires, the Board has consistently held that an employer may solicit complaints where it has a "past policy and practice" of soliciting grievances and did not "significantly alter[] its past manner and methods" of doing so. *See, e.g.*, *Walmart, Inc.*, 339 NLRB 1187, 1187 (2003) (quotation marks omitted). Here, the Regional Director's primary witness conceded that Shamrock has conducted "hundreds" of employee roundtable meetings during his 20 years with the Company to solicit employee feedback. ER151. In addition to the employee roundtable meetings, Phipps acknowledged that he has taken advantage of Shamrock's open-door policy on multiple occasions to discuss issues directly with management. ER148–60. Accordingly, not only does the Act not clearly prohibit Shamrock's

[7] In addition, the Act does not, and cannot be interpreted to, abridge Shamrock's First Amendment right to petition government officials regarding unlawful conduct on its premises. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 533–36 (declining, in light of the First Amendment right to petition government, to construe Section 8(a)(1) to bar "reasonably based but unsuccessful suits filed with a retaliatory purpose").

soliciting of complaints, but the district court's implicit finding that Shamrock violated the Act in so doing also constitutes clear error.

Finally, the Regional Director's characterization of discussions with employees as coercive "interrogation" is legally and factually unsound. As the Board has recognized, "[i]f section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution." *Rossmore House*, 269 NLRB 1176, 1177 (1984). Thus, the Act must be interpreted and applied to take account of "the realities of the workplace" like the fact that "production supervisors and employees often work closely together" and "during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts." *Id.* "[T]he test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of their protected rights." *NLRB v. L.A. New Hosp.*, 640 F.2d 1017, 1019 (9th Cir. 1981) (alteration in original) (quotation marks omitted).

Interpreting the Act to reach the Regional Director's four alleged instances of "interrogation" would raise serious First Amendment issues, while making a mockery of the Act. First, the allegation that Floor Captain Jack White unlawfully interrogated Phipps on January 25 about employees' union activities when he mentioned "rumors" about an organizing campaign and "asked [Phipps] if he knew anything" about it is belied by the facts that White worked alongside Phipps on the warehouse floor, their conversation arose cas-

ually following a chance encounter at the time clock, no evidence suggests White's tone was hostile or threatening, and White did not seek any specific information from Phipps, such as the identity of Union supporters. ER137–38; ER161–62. *See also* ALJ Decision 18–19 (dismissing charge on that basis). Put simply, a casual workplace conversation among coworkers regarding workplace rumors is not coercion, but protected speech.

Second, and similarly, Wallace's testimony that his immediate supervisor, Jake Myers, asked him on January 28 what he "[thought] about the union" describes a single casual question asked during Myers's daily rounds after employees had viewed a video on union authorization cards, not any kind of interrogation. ER170–71.[8] Third, also similarly, Safety Manager Joe Remblance's alleged "interrogation" of Phipps and another employee on April 29 consisted, in its entirety and according to Phipps, of Remblance running into Phipps and the other worker during a break, asking them "what [they] were talking about," "talking small talk with [them]," and then chiding them to get back to work at the conclusion of their break.[9] ER91. Again, there was no interrogation. Fourth, the Regional Director's final instance of alleged interroga-

[8] Wallace testified that he told Myers that his father, neighbor, and a Sysco driver had told him that union representation leads to better benefits, but that he still had "to do some research" on the issue. At that point, Myers "shook his head in agreement with [Wallace] and didn't say anything," ending the conversation. ER170–71.

[9] Phipps stated that Remblance "has come up to me in the past when I was talking to other employees and joined in conversations I was having with other employees." ER92.

tion concerns Sanitation Supervisor Karen Garzon's statement "you don't want these[,] do you?" as she disposed of two flyers Phipps had placed on a break-room table. ER98; ER202. As discussed further below, part of Garzon's job is discarding any materials left in the break room, *infra* § II.F, and her arguable overzealousness in that task on that day does not constitute the kind of coercive interrogation that Congress sought to prohibit.

Where the Act's "statutory provisions and their legislative history indicate[] no clear intent to reach" an asserted unfair labor practice, a court must "simply read the statute not to cover it, thereby avoiding the First Amendment question altogether." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 535–36 (2002). The district court's failure to heed that admonition and its deference to the Regional Director distort the Act to the point of absurdity—prohibiting routine interactions among coworkers and typical workplace chatter—while raising serious constitutional doubt.

B. Routine Interactions Among Employees Do Not Constitute "Surveillance"

The district court's finding that the Regional Director was likely to succeed on the charge that Shamrock created the impression of surveillance of union activity is clearly erroneous, based on undisputed evidence that Shamrock disclosed its source of information regarding union activities. Once again, the Regional Director's charges are premised on a hodge-podge of casual statements plucked from their contexts and heaped together to overwhelm by sheer quantity. None, whether taken individually or altogether, objectively "'would

tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.'" *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945–46 (9th Cir. 2008) (quoting *The Broadway*, 267 NLRB 385, 400 (1983)).

To begin with, the Regional Director alleged only one instance of direct "surveillance," when Floor Captain Art Manning appeared at a restaurant where a Union meeting was being held. Floor captains like Manning work on the warehouse floor with other employees, carrying out the same work tasks and, in addition, dividing work assignments among the workers on the floor. *See* ER290. Manning's unrebutted testimony was that he had been invited to attend the meeting by several coworkers,[10] believed that the meeting would be similar to other times he had joined coworkers at local restaurants to discuss work, left after 30 or 40 minutes without noticing other Shamrock employees,[11] and ran into a couple of employees on the way out.[12] ER219–22. Wallace and Phipps both testified that Manning's presence and his distinctive truck were noticed by several employees, ER141; ER173, and no evidence suggests that Wallace ever located the actual meeting at the back of the restaurant, attempted to eavesdrop on the meeting, or even attempted to ascertain who attended it, such as by surveilling their table or waiting for everyone to leave so he could

[10] Phipps testified that he had asked a number of employees to invite other workers. ER140.

[11] Phipps testified that the group was seated at a table in the back "that you can't see from the lobby." ER140.

[12] Phipps testified that he ran into Manning on the way out. ER140–41.

identify them. If Manning's purpose was to conduct surveillance of the organizing campaign, he certainly chose an unpromising way to go about it. Nonetheless, the district court apparently credited the Regional Director's unlikely charge that Manning was engaged in a spy mission.

The Regional Director's other "surveillance" charges involve statements that the Director contends "created an impression among its employees that their union activities were under surveillance." ER41. As a legal matter, an employer's statement is incapable of creating an impression of surveillance where the employer indicates that the information concerning union activities was voluntarily provided to it by other workers. *Greater Omaha Packing Co., Inc. v. NLRB*, 790 F.3d 816, 824 (8th Cir. 2015) (citing *McClain & Co., Inc.*, 358 NLRB No. 118, at *5 (2012)).

The district court addressed only three of these charges, but simply ignored undisputed evidence that the basis of the information at issue in each was disclosed—which is what the ALJ found as to those charges when it dismissed them, based on the same evidentiary showing. In this respect, the district court applied an incorrect legal standard, thereby committing abuse of discretion. First, when Warehouse Operations Manager Ivan Vaivao at a February 24 meeting stated that he knew who was responsible for alleged harassment of employees regarding union membership, he stated specifically that that information came from employees who had complained to him that the harassment had made them "uncomfortable." ER239. *See also* ALJ Decision 10 (dismissing charge on that basis). Second, when Vaivao said at a March 26

meeting that he "know[s] who" was conducting the organizing campaign, harassing workers, and attempting to recruit Union members on company time, he explained that he learned that information from employees "coming up to me and say[ing] I want a statement that these guys will leave me alone." ER244–45. *See also* ALJ Decision 12 (dismissing charge on that basis). And third, when Vice President of Operations Mark Engdahl said at an April 29 meeting that he "underst[ood] who's behind" the Union, Vaivao had already told those same workers multiple times that employees had volunteered that information to management and Phipps had already publicly announced that he was behind the campaign. ER256; ER239; ER243–45; ER142–43 (Phipps testimony regarding announcement). *See also* ALJ Decision 15 (dismissing charge on that basis).

The Regional Director's other "impression of surveillance" charges are equally meritless and, in several instances, approach the absurd. One charge is premised on Phipps's testimony that White, in the same impromptu conversation described above, "said that he had heard rumors that whoever was organizing was really close to getting the Union into the warehouse." ER138. *See also* ER90 ("White told me there were rumors in the warehouse about an organizing campaign."). That is the entirety of the Director's evidence in support of this unfair-labor-practice charge: a floor captain ran into his coworker at the time clock and mentioned he had heard some rumors. Likewise, the Regional Director charges that Remblance's conversation with Phipps and another employee not only constituted an interrogation, as discussed above, but also cre-

ated the impression of surveillance—although how, exactly, is unclear, given that the only evidence of the content of their conversation is Phipps's testimony that Remblance "ma[de] a little small talk." ER147; ER91–92. Similarly, another charge is based entirely on the use of the colloquialism "rumblings coming off the floor" to describe "hecklings," "insulting," and other disruptions in the warehouse. ER268, ER272. Not even a paranoid, much less an objective observer, would take that as an indication that "members of management are peering over their shoulders." *Flexsteel Industries*, 311 NLRB 257, 257 (1993). Nonetheless, the district court credited that charge, along with all the others.

Finally, while a superficial review might credit Floor Captain Art Manning's alleged statement to Phipps that he should "watch [his] back" because managers are "watching both of us," an objective observer aware of the context could not. Phipps had just publicly announced his leadership of the organizing campaign, and then returned to the floor, where he met Manning. ER142–44. As a floor captain, Manning works alongside the other warehouse-floor workers, with the added responsibility of dividing up work among them; he has no authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or direct employees, or to adjust their grievances. ER290. While Shamrock contests in the underlying proceeding before the Board that Manning has any supervisory status at all—as would be required for his actions to be attributable to Shamrock under the Act—it is sufficient for purposes of this appeal to recognize that his statement to Phipps was an off-

hand comment from one worker to his colleague who had just publicly announced his involvement in a controversial initiative, not a statement of fact that Shamrock was actually engaging in any kind of surveillance or threat that it would. *Cf. Rossmore House*, 269 NLRB at 1177.

C. Shamrock's Wage Increases Were Unrelated to the Union's Organizing Activity

The district court credited the Regional Director's charge that Shamrock "increased wages to discourage support for the union," albeit without making any express findings or conclusions. *See* ER6 (reciting this as one of Petitioner's claims); ER11 ("find[ing generally that] Petitioner has met the burden of showing a likelihood of success on the merits of the remaining claims," with no specific findings or discussion); ER17 (enjoining Shamrock from "granting employees benefits, including, but not limited to, increased wages…"). That was an abuse of discretion, in light of Shamrock's uncontested showing that the wage increases were supported by a legitimate business purpose unrelated to any union organizing.

"If [wage increases] were granted primarily for a legitimate business purpose, they do not violate the Act." *NLRB v. Styletek*, 520 F.2d 275, 279 (1st Cir. 1975). *See also NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 1311 (1st Cir. 1969) (setting aside NLRB order where record established that employer's promise of wage increase prior to election was for substantial business purpose and was not improperly motivated); *Delchamps, Inc. v. NLRB*, 588 F.2d 476, 481 (5th Cir. 1979) ("The Board's collection of suspicious activities may be suf-

ficient to require Delchamps to come forward, as it has, with a legitimate business justification for the challenged wage increase.").

Here, the undisputed evidence before the district court establishes both that Shamrock had legitimate business purposes for increasing wages and that it did not and could not have granted the wage increases for the purpose of interfering with organizing activity.

First, Shamrock increased wages for workers in the returns, will-call, and sanitation departments after "experiencing significant difficulty in attracting candidates for open positions" and discovering that its pay scale for these departments was lower than the terms on which it could obtain temporary labor. ER294–95. And Shamrock increased wages for one of its thrower classifications (out of three) due to a change in operations imposing "a significant increase in their workload." ER295. These legitimate business purposes are analogous to those credited by the courts in *Delchamps*, 588 F.2d at 479 ("institut[ion] of a compensation system based on the wages paid by its major competitors"), and *Gotham*, 406 F.2d at 1311 ("increasing tightening of the local labor market"). The Regional Director introduced no evidence to counter this showing of a legitimate business purpose.

Second, Shamrock increased wages for only a limited number of employees, and the Regional Director made no showing that that set of employees was equivalent to, or even substantially overlapped with, the bargaining unit that the Union seeks to represent. Wage increases were awarded only to approximately 33 employees working in the four job classifications (of more

than 30) that corresponded with Shamrock's business purpose in raising wages. ER294–95. That Shamrock did not attempt to target wage increases to the group of workers being courted by the Union confirms that its purpose was legitimate and had nothing to do with any organizing activity.

Third, the Regional Director's own evidence indicates that the wage increases, due to their timing, made no sense as an attempt to interfere with any organizing activity. Shamrock granted the wage increases in late May 2015. ER294. But Phipps, who was leading organization efforts and is the Regional Director's principal witness, testified on May 21 that "[t]he campaign is pretty much stalled right now." ER94. Where an employer "could assume…that the organizing campaign was to be held in abeyance for the time being," an inference of intent to interfere with organizing activity is undermined. *Sigo Corp.*, 146 NLRB 1484, 1486 (1964).

The Regional Director made no attempt below to rebut these points. In fact, his only evidence concerning the wage increases showed only that they (1) occurred (2) at a particular point in time. No evidence even suggests that they had anything to do with what was, at that time, an already dormant organizing campaign. On this record, the district court's implicit finding to the contrary, or its failure to consider at all Shamrock's evidence of legitimate purpose, is unsupportable.

But if the Court has any doubt on that score, it should vacate that aspect of the injunction so that the district court can carry out its obligation pursuant to Fed. R. Civ. P. 52(a)(2), which requires district courts to "set forth findings

of fact and conclusions of law supporting an order granting an injunction." *See FTC v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1208, 1212 (9th Cir. 2004) (vacating preliminary injunction and remanding "for proper findings of fact supported by a record made in open court").

D. Shamrock Never Disciplined Lerma and Had Every Right To Counsel Him About Harassing Conduct

The district court's finding that the Regional Director is likely to succeed on the merits of his claim that "Lerma was unlawfully disciplined as a result of his union activity" is untenable. ER11. The district court based its finding solely on Lerma's espoused interpretation of statements at a May 5 meeting as a warning of termination if he did not cease organization activity, *id.*, but this is both legally insufficient to demonstrate unfair labor practices and a clearly erroneous reading of the record.

The gravamen of the Regional Director's charge is that Vice President of Operations Mark Engdahl disciplined Lerma at the meeting due to Lerma's organizing activities and to discourage others from engaging in such activities. ER48–49. The meeting was held after Engdahl received reports that Lerma was engaging in "intimidation" and "heckling[]" of other employees. ER121–23; ER185, ER188–90. Engdahl held the meeting to advise Lerma that such conduct was not appropriate, before the situation escalated to the point of discipline. *Id.*

The meeting did not constitute "discipline[]," nor was it "unlawful[]." "An employer violates [29 U.S.C. §] 8(a)(3) when the employee's involvement

in a protected activity was a substantial or motivating factor in the employer's decision to discipline or terminate the employee." *Frankl ex rel. NLRB v. HTH Corp.*, 693 F.3d 1051, 1062 (9th Cir. 2012) (*Frankl II*). Where an employer "would have taken the same action regardless of the employee's union activity," there is no violation. *Id.*

First, Engdahl met with Lerma not to discipline him, but to explain that intimidation and harassment would not be tolerated and ensure that no discipline would be required in the future. Engdahl had heard reports of Lerma's involvement in targeting employees that resisted unionization, potentially rising to the level of "harass[ment]," including one employee "having pens thrown at him because he wouldn't sign a card." ER185, ER188. The transcript of the meeting reflects that Engdahl: (a) told Lerma the meeting concerned reports of "hecklings," "insulting," and disruption to work operations in the form of a slowdown, ER268; *see also* ER272 ("feedback is coming around [that coworkers] are being—you know, they—they feel threatened or intimidated"); (b) repeatedly told Lerma he was "not getting in trouble," ER274–75); (c) disavowed any intent to "scare" Lerma, ER270–71; and (d) told Lerma "It's okay to express your opinion" so long as he stayed short of "intimidation," ER271. No record of the meeting or any disciplinary action was placed in Lerma's personnel file—as would be required for disciplinary actions under Shamrock's written policies.

Instead, pursuant to Shamrock's policy, the meeting constituted a "Step 1 Counseling." ER128; ER228 (written policy). The policy distinguishes a

"Step 1 Counseling" from a "Step 2 Verbal Warning." *Id.*[13] This is consistent with Engdahl's statements at the Meeting that Lerma was not "in trouble" and that Engdahl merely wanted to give Lerma a "heads-up" to understand Shamrock's position that intimidation "won't be tolerated," ER268, ER274–75.

The meeting did not constitute "interfer[ence] with, restrain[t of], or coerc[ion] of [Lerma] in the exercise of" his labor rights, 29 U.S.C. § 158(a)(1), nor "discrimination in regard to…any term or condition of [Lerma's] employment to…discourage membership in a[] labor organization," *id.* § 158(a)(3). To the contrary, Engdahl specifically told Lerma he was *free to continue advocating for unionization* so long as he did not intimidate his coworkers. That is not interference, restraint, or coercion. Nor did the counseling meeting impact the terms and conditions of Lerma's employment. Instead, it was the kind of "one-time verbal" counseling that "had no effect on [plaintiff's] job duties and was not placed in [his] personnel file" that the Court has recognized "d[oes] not rise to the level of adverse employment action." *Hellman v. Weisberg*, 360 F. App'x 776, 779 (9th Cir. 2009) (affirming summary judgment for defendants on Title VII and First Amendment retaliation claims). *Cf. NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 919 (9th Cir. 1982) (setting aside Board remedy where employer conduct was "isolated and minimal").

Second, Engdahl's motive in meeting with Lerma was not to deter union activity but to ensure an undisrupted workplace. "A finding that disciplinary

[13] The petition mischaracterizes the meeting as a "verbal warning." ER54.

action constitutes an unfair labor practice must be bottomed on a determination that the employer's motive was unlawful." *NLRB v. Best Prods. Co., Inc.*, 618 F.2d 70, 73 (9th Cir. 1980) (denying enforcement where Board's finding of unlawful motive premised on "findings that the company was generally anti-union"). Shamrock's written policy on "appropriate conduct" required Engdahl to counsel Lerma against bullying, intimidation, and harassment regardless of whether unionization activities were implicated in the reports of such conduct. *See* ER227 (requiring that employees "adhere to acceptable business practices in matters of personal conduct" and observe "sincere respect for the rights and feelings of others"); ER228 (forbidding "[a]ny act that interferes with another associate's right to be free from harassment"). Such policies are not only permissible under the Act, but are also "commonplace" and prudent to avoid hostile-workplace liability. *Adtranz*, 253 F.3d at 27.

"An employer may *discharge or suspend* an employee for any reason other than engaging in protected activity." *Best Prods. Co.*, 618 F.2d at 74 (emphasis added). *A fortiori*, an employer may take the much less severe measure of a counseling meeting for the legitimate purpose of avoiding physical bullying, harassment, and improper disruptions of work operations. That is what Engdahl did at the May 5 meeting, as he repeatedly explained to Lerma. That is not an unfair labor practice. This Court should reverse the district court's finding of likelihood of success with regard to the unlawful discipline claim arising from the meeting.

E. Wallace's Dismissal Had Nothing To Do with His Union Support—Which Was Unknown to Shamrock

Any claims seeking relief for Wallace in this proceeding are moot in light of his refusal of reinstatement. *See infra* § V. The district court's finding that the underlying charges are likely to succeed is also clearly erroneous.

Under the burden-shifting approach of *Wright Line*, 251 NLRB 1083 (1980), the General Counsel must make an "initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision." *Am. Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002) (quotation marks omitted). That entails four elements:

(i) That the employee engaged in protected, concerted activity;

(ii) That the employer knew of the employee's protected, concerted activity;

(iii) That the employee was subject to an adverse employment action; and

(iv) That a motivational link, or nexus, existed between the employee's protected activity and the adverse employment action.

Id.

Because an "employer may discharge [an] employee for any reason, whether or not it is just, as long as it is not for protected activity," *Yuker Constr. Co.*, 335 NLRB 1072, 1073 (2001) (citing *Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993)), the second and fourth elements are critical to establish a link between an employee's protected activities and an adverse employment action.

No such link is apparent here, where Shamrock had no knowledge of Wallace's minimal union activities and also had a good reason to discipline him for storming out of a town hall meeting conducted by company executives. As to knowledge, the district court found that Shamrock was on notice as to Wallace's activities after he "spoke up" at January 28 and March 31 meetings and was spotted by an alleged supervisor, Manning, at an offsite union meeting. ER9. But, in so finding, it simply ignored Wallace's own admission that he was not aware of the organizing campaign at the time of the January meeting, ER106–07, as well as his admission that neither he nor anyone else mentioned anything about the Union during the March meeting, ER176–77. Instead, his remarks (like those of other employees, who were not disciplined in any fashion) concerned Shamrock's health insurance plan. ER174–75. And there is no indication that Manning, who left the offsite meeting early, even saw Wallace there. ER173. Given that Wallace was not (per Phipps's testimony) perceived as a leader of the organizing campaign, ER93, there was no evidentiary basis for the district court to conclude that Shamrock had any knowledge of his union support.

The district court also erred in rejecting the explanation of Warehouse Operations Manager Ivan Vaivao that Wallace was fired because "he got up and stormed out" of the March town hall meeting after Shamrock's Director of Human Resources responded to his questioning Shamrock's decision not to pay 100 percent of employees' health care costs despite its "through the roof" revenues that year. ER114; ER251. The district court's basis for discounting

that evidence was that an audio recording and transcript did not reflect that Wallace's tone was at all disrespectful or belligerent, but Vaivao freely conceded as much, explaining that it was the "storm[ing] out"—which is obviously not reflected in an audio recording or transcript—"that was the disrespect piece for me." ER114. That explanation is supported by the fact that Shamrock did not take any action against other employees who were similarly situated to Wallace in their Union support and criticism of Shamrock's health plan but who did not storm out of a meeting.

In short, the evidence fails to show that Shamrock had any knowledge of Wallace's Union support and does not at all rebut Shamrock's showing that Wallace stormed out of a meeting being conducted by several of its senior executives—an all-but-guaranteed route to dismissal in any company. The district court's decision to credit the Regional Director's unsupported and unlikely chain of events—that Shamrock randomly singled out a possible union supporter for retaliation after he joined other employees in questioning the company's health benefits—is clearly erroneous and should be reversed on that basis, if the Court does not find that any claims regarding Wallace are moot.

F. Unrebutted Evidence Shows That Shamrock Did Not Confiscate Union Literature

Any finding that Shamrock unlawfully "confiscated" union literature—the district court made no express findings on that charge, even while ruling against Shamrock on it—is clearly erroneous based on the undisputed facts.

An employer is not required to allow union literature to be left unattended in locations where unattended flyers are not permitted. "While Section 7 is read to bestow upon employees the right to solicit or distribute literature on company premises in certain circumstances, it does not bestow upon them a right to use…plant surfaces for the posting of information." *Eastex, Inc.*, 215 NLRB 271, 272 (1974).

The Regional Director complained that Shamrock "confiscated" union literature by virtue of the fact that Sanitation Supervisor Karen Garzon discarded flyers left lying on break room counters. ER60. But Garzon's undisputed testimony reflects that she routinely discards *any* written materials left on break room counters other than health information that Shamrock puts out for employees to review. ER207–08. Garzon testified that, consistent with Shamrock policy, she has discarded Tupperware advertisements, business cards, and various other materials. ER208. The Regional Director introduced no evidence to the contrary.

Accordingly, the district court's finding that the Director is likely to succeed on the merits of this charge is clearly erroneous.

III. The District Court's Finding of Irreparable Injury Is Both Erroneous and Inadequate To Support the Breadth of the Injunction

If the Court does not reverse the district court's decision as an abuse of its discretion for wrongly presuming irreparable injury, *see supra* § I.B, its preliminary injunction should still be vacated in whole or in part because there is no support for the district court's decision that the alleged unfair labor practic-

es likely would irreparably harm the Union in a manner that could not be effectively remedied by a subsequent Board order. As explained above, *see supra* § I.B, Section 10(j) relief is proper only to the extent necessary to preserve the Board's remedial authority where the passage of time would otherwise erode it.

First, the district court's simplistic "correlation equals causation" findings concerning a purported "slowdown" in union representation cards is insufficient support for any aspect of the injunction because it disregards compelling evidence that there was no slowdown, let alone a slowdown that merited a preliminary injunction. In the time period in which union support had purportedly diminished following the alleged unfair labor practices, the union filed a charge with the Board asserting that it has collected union representation cards from a majority of employees in its preferred bargaining unit. ER285. This charge of majority status is a significant matter, being made with the express knowledge that "willful false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 1001)." ER282.

Given that Section 8(a)(1) of the Act is intended to preclude employers from interfering with employees' right to choose whether to be represented by a union for collective bargaining, the Union's admission that Shamrock's employees were vigorously exercising their right to hold an election about whether they should be represented by the union for collective bargaining, through the submission of union representation cards, rebuts strongly the district court's conclusion that the union would be irreparably harmed in the absence

of the extraordinary remedy of a preliminary injunction. At the very least, the Union's claim that it had obtained majority support of Shamrock's employees, and request that the Board intercede through its administrative processes, made it incumbent on the district court to show how an injunction is now more appropriate to address these issues than a Board order enforced through processes established under the NLRA. *See, e.g.*, *McKinney ex rel. NLRB v. Creative Vision Resources, LLC*, 783 F.3d 293, 295 (5th Cir. 2015).

Second, the district court failed entirely to explain why its preliminary injunction of Shamrock's alleged violations of Section 8(a)(1) was necessary to avoid irreparable harm. The district court's decision does not, therefore, support the entry of the broad, multipart preliminary injunction order.

Nearly all the Regional Director's allegations, and the first thirteen subparts of the district court's injunction, *see* ER16–17, concern Section 8(a)(1). But the district court did not attempt to identify how any particular alleged Section 8(a)(1) violation would cause irreparable harm, nor could it logically have done so, given that the district court did not even explain *how* Shamrock violated Section 8(a)(1) for many of the alleged unfair labor practices it enjoined. *See* ER11. And it is certainly not apparent how the hodge-podge of casual conversations, employee chatter, and other unremarkable conduct that are the subject of the Section 8(a)(1) charges could support a finding of irreparable injury.

Indeed, the only specific unfair labor practice that the district court identified as supporting its finding of injury was a Section 8(a)(3) claim related to

Wallace. *See* ER12. The closest thing the district court drew to a link between the alleged Section 8(a)(1) violations and irreparable harm were its statements that "the number of union representation cards signed had already started to decline before Wallace was discharged" and that the union's purported "'momentum began to drop off significantly after [Shamrock] started conducting its roundtable meetings and after Wallace was discharged.'" ER12–13 (quoting Phipps affidavit). The first statement, concerning a decline in union representation cards, is insufficient because it does not consider whether the purported slowdown would be addressed sufficiently by a Board order and it does not attribute the slowdown to any specific alleged unfair labor practice or practices. The second statement mixes-and-matches the Wallace termination with the roundtable meetings between Shamrock and the Union, many of which are not the subject of charges.

The district court cannot bootstrap the first thirteen subparts of its injunction, enjoining alleged Section 8(a)(1) violations, based on irreparable harm alleging Section 8(a)(3) violations. Absent specific findings of irreparable harm that both was caused by the alleged Section 8(a)(1) violations and that likely would not effectively be remedied by the Board's subsequent order, the majority of the district court's injunction cannot stand. *See League To Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, No. 08-2828, 2009 WL 3048739, at *6 (E.D. Cal. Sept. 18, 2009) (courts must "consider whether a narrower injunction…will suffice, or whether the conduct permitted by the narrower injunction is instead also likely to cause irreparable injury") (citing *Sierra Forest Legacy*

v. Rey, 577 F.3d 1015 (9th Cir. 2009)). *See also Custom Sports Apparel, Inc. v. Squires Hightech Corp.*, 26 F. App'x 68, 71 (2d Cir. 2002) (vacating paragraph of preliminary injunction that was not supported by appropriate district court finding of irreparable harm).

Third, the district court's irreparable harm analysis cannot stand now that Wallace has declined reinstatement. The only specific alleged unfair labor practice that the district court identified in its irreparable harm analysis was his termination. *See* ER12–13. Wallace declined reinstatement. Wright Declaration. This court lacks jurisdiction under Section 10(j) over any alleged unfair labor practices with regard to Wallace, as there is nothing left to enjoin. *See infra* § V. Given the Regional Director's and the district court's heavy reliance on the purported irreparable harm caused by Wallace's termination, its lack of jurisdiction over that claim precludes the Court from affording any weight to any harm caused by Shamrock's alleged actions to him and demands vacatur.

IV. The District Court's Assessment of the Balance of Harms and Public Interest Is Tainted by Its Legal Error on the Merits and Inexplicable Disregard of Shamrock's Speech and Employer Interests

As described above, the district court's findings on the balance of harms and public interest were premised on its inappropriate deference to the Regional Director on the merits, *see supra* § I.C, such that they are tainted by the court's legal error in discounting Shamrock's speech rights and apparent belief that government action is appropriate or permissible to stifle an employer's expression of anti-union views. They are also untenable, in that that the injunc-

tion contravenes Congress's express policy judgment in favor of free and uninhibited debate.[14]

The Supreme Court has identified the policy underlying the enactment of Section 8(c):

> [I]ts enactment…manifested a congressional intent to encourage free debate on issues dividing labor and management. It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes, stressing that freewheeling use of the written and spoken word…has been expressly fostered by Congress and approved by the NLRB.

Chamber of Commerce v. Brown, 554 U.S. 60, 67–68 (2008) (third alteration in original) (quotation marks and citation omitted).

The Regional Director asked the district court to "send[] a message" by entering an injunction, ER6, but enjoining an employer's robust expression of its views is not a message that the Act promotes or even permits. It runs counter to the Act's express policy of protecting legitimate debate and violates employees' "right to receive information opposing unionization." 554 U.S. at 68.

The district court's unsupported assertion that "granting Petitioner relief would pose little, if any, harm to Respondent," ER13, does not withstand scrutiny. The underlying conduct at issue implicates Shamrock's expression of its

[14] Contrary to the district court's statement, ER13, Respondent did address both issues in its opposition. *See* ER64.

views, its management of the workplace (including preventing harassment and disruption), its relations with its employees (including soliciting their complaints), and its legitimate business interests (including setting competitive wages and benefits). In addition to the obvious speech-rights injury to Shamrock, the injunction undermines its ability to conduct its business. For example, the prohibition on "granting employees benefits," while nominally limited to grants "for the purpose of influencing employees' union activity," appears to bar any increase so long as the Union continues its organizing campaign—given that the existence of that campaign was the only factual basis for the wage-related charge. Likewise, the prohibition on "soliciting employee complaints and grievances" can only be understood, given the conduct underlying the charge, to bar Shamrock from carrying out the kind of employee roundtable meetings and routine discussions with employees that it has done for years. The district court never paused to consider how a business is supposed to operate if it is barred from adjusting benefits or even asking employees for their views on things for the duration of an organizing campaign that remains in effect so long as the Union says it does. And it never considered how those things might affect the interests of Shamrock's employees.

In light of the "significant public interest in upholding First Amendment principles," only "an especially strong showing on other preliminary injunction prongs" aside from likelihood of success on the merits will suffice. *Overstreet v. United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1208 n.13 (2005) (quo-

tation marks omitted). The Regional Director's cobbled-together case against Shamrock does not meet that standard.

V. Injunctive Relief Regarding Wallace Is Moot

Wallace has released any claim to reinstatement, *see* Wright Declaration, and the Regional Director's request for injunctive relief regarding Wallace is therefore moot. The portion of the injunction pertaining to Wallace must therefore be vacated.

A temporary injunction is "a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). In the context of a Section 10(j) action, where an injunction serves only to preserve the Board's remedial power, such relief serves no purpose where the Board lacks remedial power due to mootness. A claim is moot "[i]f there is no longer a possibility that [the litigant] can obtain relief for his claim." *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (quotation marks omitted). A federal court has no power to afford injunctive relief where no remedy is possible due to mootness. *Protect-marriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014).

No possible relief is available for any claim involving Wallace because Wallace no longer wishes to be reinstated and has disclaimed any right to reinstatement, depriving the Board of the ability to obtain his reinstatement. Injunctive relief regarding Wallace is therefore moot. *Compare EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (holding agency's claim for back pay moot where employee at issue "freely contracted away her right

to back pay"); *Kaynard v. MMIC, Inc.*, No. 83-0715, 1983 WL 2104, at *2 (E.D.N.Y. Oct. 31, 1983) (holding Section 10(j) reinstatement claim moot where employee "did not accept the offer" of reinstatement and "is currently employed elsewhere").

There no longer being any live controversy over injunctive relief concerning Wallace, the Court must vacate those provisions of the preliminary injunction that pertain to him. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–41 (1950).

Conclusion

For the foregoing reasons, the temporary injunction entered by the district court should be vacated.

Respectfully submitted,

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Statement of Related Cases

Appellant is aware of no cases pending in this Circuit that satisfy the definition of "related cases" in Circuit Rule 28-2.6.

Certificate of Compliance

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Calisto MT typeface.

Dated: March 3, 2016

/s/ David B. Rivkin, Jr.
David B. Rivkin, Jr.

Certificate of Service

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 3, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 3, 2016

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